No Fault Discrimination? Using the Americans with Disabilities Act as a Model for "Norm Advocating" Mediation in Title VII Disputes

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I. INTRODUCTION

The current mechanisms of obtaining statutory relief in federal discrimination suits are unsatisfactory for employees. The traditional method of judicial enforcement causes an employee to endure significant time and monetary expense to resolve the complaint.[1] Although the number of employment actions filed in federal court continues to increase, the number of cases that proceed to trial has consistently decreased in that same period.[2] Growing numbers of employees are not able to obtain relief after a federal pleading.[3] Therefore, with significant problems in judicial relief remedies for employment discrimination cases, it is important for employees to have other effective mechanisms for enforcing their statutory rights. "Norm advocating" mediation is the forum that best addresses the specific issues in employment discrimination disputes.[4]

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[1] Laurie Leader & Melissa Burger, *Let's Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMP. RTS. & EMP. POL'Y J. 87, 88 (2004).

[2] *Id.* From 1990–1998, the number of federal discrimination employment actions has increased from 8,413 to 23,735. However, the number of cases that have progressed to trial have decreased in that same time period. *See id.*

[3] *See id.* at 89.

[4] *See, e.g.*, Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 746 (1997). "Norm advocating" mediation is a model of mediation that incorporates relevant social and legal norms into the solution. *See id.* at 709. It has also been referred to as "rights-based" mediation. *Id.*

Arbitration has traditionally been the alternative dispute resolution method of choice for employers.[5] Surprisingly, employees in arbitration fare significantly better than employees defending their legal rights in federal court.[6] However, the enforcement of statutorily protected rights in an arbitrational forum presents several problems. For one, without procedural safeguards in place, arbitration's structure, which prioritizes efficiency and cost containment, makes it an inappropriate forum for resolving federally mandated claims.[7] Secondly, although the Federal Arbitration Act (FAA) broadly endorses private adjudication of disputes, arbitrating statutory claims has a potentially negative impact on the ability to create new judicial standards.[8]

With the efficiency and procedural concerns inherent in judicial and arbitrational remedies, mediation has emerged as the preferred form of workplace discrimination resolution.[9] With mediation's focus on

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[5] *See* 9 U.S.C. § 1. Arbitration agreements have been a fixture of business transactions since Federal Arbitration Act's passage in 1925. *See also* Leader & Burger, *supra* note 1, at 91 ("The FAA's purpose is unmistakably commercial.").

[6] *See* Leader & Burger, *supra* note 1, at 89 (specifying that employees are successful in arbitration 63% of the time, whereas employees prevail in federal district court only 14.9% of the time).

[7] *See* Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 2 (1999); *see also* William H. Daughtrey Jr. & Donnie Kidd Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 86–87 (1998) (arguing employment law's unique challenges do not fit into the traditional arbitration structure). *See generally* AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW, 926–27 (8th ed. 2010) ("Procedural rules governing the arbitrator's conduct of the hearing can be defined in the arbitration agreement, but the general practice is that there is no, or very limited, prehearing discovery, the rules of evidence do not apply, and there may be no record of the proceedings.").

[8] *See* Leader & Burger, *supra* note 1, at 117; *see also* Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 27 MINN. L. REV. 703, 707–24 (1999).

[9] *See* Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 PEPP. DISP. RESOL. L.J. 211, 216 (2009); *see also* David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 DISP. RESOL. J. 66, 67 (1999) (92% of corporations used mediation for rights-based disputes. "Rights-based" was defined as disputes that arose out of an existing agreement.); David B. Lipsky & Ronald L. Seeber, *Top General Counsels Support ADR*, 8 BUSINESS LAW TODAY 24, 24–27 (1999) (out of 606 lawyers surveyed, 88% reported using mediation in the survey period). The general counsels explained their predominant mediation use as: 81% used mediation because it was "a more satisfactory experience" than litigation, 66%

collaboration and problem solving, rather than adversarial stand-offs, mediation can provide numerous benefits in employment discrimination cases.[10] Through a process-based and remedial focus, mediation provides solutions to the most common goals of discrimination victims: ending the offensive conduct, guaranteeing that the offensive conduct will not continue, providing protection from retaliation, and regaining a positive work environment.[11]

The Americans with Disabilities Act (ADA) is a federal discrimination statute that can serve as a model for resolving other employment discrimination suits. The ADA operates well under mediation's supportive and cooperatively driven means of dispute resolution because the Act explicitly prohibits discrimination based on disability without attaching the moral stigma that occurs with discrimination claims in other statutes.[12] Using

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used mediation because it provided "more satisfactory settlements," and 59% used mediation because it "preserves good relationships." *Id.*

[10] Hippensteele, *supra* note 9, at 216–17. Proponents of mediation "suggest the rise in popularity of mediation is linked to widespread consumer satisfaction, stemming from mediation's monetary and nonmonetary savings, speed, efficiency, flexibility of solutions, and its problem-solving orientation, as well as the disputants' greater sense of control over the mediation process and outcome, as compared to more formal options." *Id.*

[11] *Id.* at 234–36. Mediation helps solve the goals of the complainant because mediation theory is premised on relational outcomes. These relational outcomes are achieved through mediation with several assumptions: (1) the employee's goal is to move beyond the discriminatory experience, (2) mediation is the optimal forum to allow moving beyond a negative experience, (3) both parties will enter mediation in good faith and the employer's attitude towards the employee will be more positive than the current discriminatory situation, and (4) the mediator will remain neutral, and (5) not exhibit any biases. *See id.* at 236.

[12] Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 246 (2003). Many courts attach liability under the Americans with Disabilities Act without attaching the correlating moral blame that often occurs in Title VII cases. For example, in *Borkowski v. Valley Central School District*, the Second Circuit was asked to determine whether a teacher, whose disabilities directly affected her ability to perform her job, could insist on a teacher's assistant by means of reasonable accommodation. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 133–34 (2d Cir. 1995). Although the Second Circuit ultimately determined the school board did conclusively discriminate on the basis of her disabilities, it framed the discussion as the school board's obligations under the law and did not impinge consciousness of their actions on their behalf. *See id.* at 144. The focus in disability case law is "inclusion of the disabled without the indication that the

the principles behind the ADA, mediation for employment discrimination can be focused on accommodation and workplace solutions.[13]

Consistent use of norm advocating mediation, with an emphasis on non-perpetrator objectives, provides the best promise of fairly resolving employment discrimination claims.[14] Norm advocating mediation addresses the emotional and ongoing nature of employment discrimination in a manner that arbitration and litigation cannot, while still fulfilling statutory mandates.[15] Further, by focusing on objective goals modeled after the ADA's reasonable accommodation structure, norm advocating mediation can preserve a continuing employment relationship.

However, given mediation's collaborative focus, in order for norm advocating mediation to protect grievant's statutory rights, the Equal Employment Opportunity Commission (EEOC) needs to implement increased procedural safeguards.[16] Norm advocating mediation should feature trained mediators, reviewable and enforceable settlements, and legal representatives available for each party to the proceeding.

With these adaptations, norm advocating mediation can prove to effectively solve workplace discrimination claims. This note will illustrate why a version of norm advocating mediation with a non-perpetrator objective

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employers were being mean-spirited in not having instituted the accommodations beforehand." Butcher, *supra* note 12, at 249.

[13] Butcher, *supra* note 12, at 249–50 ("What is striking in the contrast between disability and race or sex discrimination law is that although the goals of both disability and race/gender discrimination laws are the same, it is because we think that disability could be a licit ground upon which to exclude someone from employment that we never insert the language of intent or the implicit stigma of being a morally-bankrupt perpetrator into ADA jurisprudence or discussions."). Both ADA and Title VII seek to include disadvantaged groups into the workplace. Therefore, with the similar goals, Title VII jurisprudence could also increase employment opportunity without focusing on moral stigma.

[14] *See* Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J AM. U. 1007, 1064 (1996). Any mediation program should strive for a high settlement and compliance rate, high party satisfaction, effective adjudication of statutory goals, and adequate procedural protections for the parties. *See id.* The proposed model meets these goals.

[15] Waldman, *supra* note 4, at 753.

[16] *See id.* at 737. With the increase of mediation in the workplace, the American Arbitration Association established "a protocol for the mediation of statutory disputes arising out of employment relationships." *Id.* The American Arbitration Association's solution was to incorporate legal norms, improve mediator training, and competence in employment and discrimination law. *See id.*

will most effectively resolve employment discrimination claims. Part II, below, examines the current problems in judicial and arbitrational relief and how mediation, particularly norm advocating mediation, can improve employer and employee satisfaction. Part III argues that the unique non-perpetrator structure of the ADA can serve as a model in Title VII mediations to increase viable solutions. Finally, Part IV suggests improvements for norm advocating mediation of employment discrimination claims to adequately and effectively safeguard statutory rights.

II. INEFFICIENCIES IN THE CURRENT RELIEF SCHEME

A. *Inability to Obtain Judicial Relief*

1. *Enforcing Statutory Rights*

The federal court system has always been a viable option for employees to enforce their statutory rights. Traditionally, the enforcement of statutory rights was within the exclusive purview of the federal courts.[17] In the seminal arbitration case, *Wilko v. Swan*, the Supreme Court held an issue under the Securities Act of 1933 could not be compelled to arbitration despite an agreement to the contrary because the dispute concerned federally protected rights.[18] The Supreme Court's holding was premised on the belief that the judicial forum was a better avenue for enforcing statutory rights.[19] As such, a party should not be required to waive statutory rights as a result of a

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[17] Wilko v. Swan, 346 U.S. 427 (1953). In *Wilko*, the plaintiff, a securities purchaser, wanted to recover damages under § 12(2) of the Securities Act of 1933 against the defendant for making false representations that induced the sale of securities. *Id.* at 428. The plaintiff and defendant had signed an agreement binding them to arbitrate any of their claims in accordance with the Federal Arbitration Act. *Id.* at 429. However, the Securities Act contained a provision, § 14, which rendered void any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision." *Id.* at 430 n.6. Thus, the Supreme Court needed to decide whether § 14 of the Act made any arbitration agreement void. *See id.* at 430. The Supreme Court voided the arbitration agreement, saying that the Securities Act cannot be properly enforced in an arbitrational tribunal. *See id.* at 438.

[18] *Id.* at 434–35 ("This arrangement to arbitrate is a 'stipulation,' and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act.").

[19] *Id.*

predispute arbitration agreement because arbitration's informality makes it an inappropriate forum for statutory interpretation.[20]

The Supreme Court applied the *Wilko* rationale to the enforcement of employment discrimination claims in federal courts in *Alexander v. Gardner-Denver Co.*, holding that federal discrimination claims were subject only to a federal court's jurisdiction.[21] In *Alexander*, the Supreme Court addressed whether a Title VII discrimination claim could be compelled to arbitration.[22] In the case, Harrell Alexander was terminated from his position as a drill operator for Gardner-Denver Co.[23] Alexander decided to grieve his termination under the collective bargaining agreement.[24] During his union grievance, Alexander did not allege racial discrimination.[25] However, before the conclusion of the union grievance, Alexander also filed a charge with the EEOC under Title VII of the Civil Rights Act of 1964 because he felt he "could not rely on the union."[26] The arbitrator ruled that Alexander had been fired for just cause and did not reference racial discrimination.[27] The EEOC similarly determined there was no basis to find a Title VII violation.[28] Alexander was notified of his right to file a civil action against the company.[29] Consequently, Alexander filed a Title VII claim in federal court alleging racial discrimination.[30] The District Court held that this issue had already been determined by arbitration and that the verdict was binding.[31] The Court of Appeals for the Tenth Circuit affirmed.[32]

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[20] After the *Wilko* decision, the lower courts offered justification for enforcing statutory rights in court. In American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), the Second Circuit said, when confronted with compelling an antitrust claim under the Sherman Act, that "We do not believe Congress would have intended such claims to be settled elsewhere than the courts." *Am. Safety Equip. Corp.*, 391 F.2d at 827.

[21] Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

[22] *Id.* at 38.

[23] *Id.*

[24] *Id.*

[25] *Id.* ("The grievance stated: 'I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay.'").

[26] *Id.* at 42.

[27] *Alexander*, 415 U.S. at 42.

[28] *Id.* at 43.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

The Supreme Court granted certiorari to determine whether a Title VII statutory claim resolved through arbitration could nonetheless proceed to federal court.[33] The Court held that a Title VII claim could proceed to federal court regardless of any prior alternative dispute resolution or union grievance decisions.[34] The Court said, "Title VII [of the Civil Rights Act of 1964] . . . vest[s] federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit . . . There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests the federal courts of jurisdiction."[35]

With *Alexander*, the Supreme Court set up two distinct regimes for complaints that were covered by an arbitration agreement. If that complaint contained a federal issue, the complaint would go to federal court regardless of the language or existence of the arbitration agreement.[36] If the claim did not contain a federal issue, the complaint would be covered by the arbitrator pursuant to the Federal Arbitration Act.[37]

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[33] *Alexander*, 415 U.S. at 43.

[34] *See id.* at 49. *See generally* Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000) (providing a modern analysis of the privatization of employment discrimination within a labor law context).

[35] *Alexander*, 415 U.S. at 47. As the complaint was in the context of collective bargaining agreement, the Court emphasized the distinction between complaints that proceed to arbitration and complaints that are resolved through the federal courts: "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." *Id.* at 49–50.

[36] *See id.* at 47–48. The Supreme Court emphasized the importance of resolving federal questions in the federal courts by summarizing, "in general, submission of a claim to one forum does not preclude a later submission to another." *Id.* at 47.

[37] *Id.* at 50. Rights enforced in arbitration are contractual in nature. *See id.* at 49. The Court likened the distinction between contractual and statutory rights to the National Labor Relations Act. *See id.* at 50–51. In the National Labor Relations Act, "[w]here the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation

In subsequent cases, the Supreme Court reversed the *Wilko* framework and allowed statutory enforcement to be achieved through arbitration.[38] In a trilogy of cases known as *Mitsubishi* Trilogy, the Supreme Court rejected the ideology behind *Alexander* that determining federal issues in an arbitrational forum forecloses the right to enforce statutory rights.[39] Instead, the Court viewed arbitration as merely a choice of forum that was equally capable of enforcing statutory rights.[40]

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certificate under the Act. ... There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.*

[38] The Supreme Court's treatment of statutory claims as arbitrable began with the *Mitsubishi* Trilogy (Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985)). In *Mitsubishi*, a Japanese, a Swiss, and a Puerto Rican corporation entered into an agreement to distribute cars outside of the U.S. *Mitsubishi*, 472 U.S. at 617. Aggravated by slowing car sales, the companies began to dispute the terms of the agreement and could not resolve the issue. *Id.* Mitsubishi brought an action in federal district court to compel arbitration of the dispute under the Federal Arbitration Act. *Id.* Soler-Chrysler countered Mitsubishi's action alleging that Sherman Act violations could not be decided in arbitration. *Id.* at 625. The Supreme Court ruled that federal antitrust violations could be subject to arbitration. Significantly, the Supreme Court said, "We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its [kind] a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* (quoting 9 U.S.C. § 2). In *Rodriguez de Quijas*, the Supreme Court directly overruled *Wilko v. Swan* by holding, that § 14 of the Securities Exchange Act of 1933 does not void an arbitration clause under the Federal Arbitration Act. *Rodriguez de Quijas*, 490 U.S. at 480. In *McMahon*, the Court emphasized its holding in *Rodriguez de Quijas* by stating that federal claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act (RICO) were arbitrable under the Federal Arbitration Act. *McMahon*, 482 U.S. at 238, 242.

[39] *Mitsubishi*, 473 U.S. at 628. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Id.*

[40] *McMahon*, 482 U.S. at 232. The Supreme Court clearly emphasized its new standard by stating, the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *Id.*

Despite the Supreme Court's broad acceptance of arbitration as an equally sufficient forum to resolve statutory disputes, many critics and commentators continue to embrace the traditional philosophy.[41] The concern about broadening the exclusive judicial resolution of statutory claims is twofold: One, alternative dispute resolution threatens the Seventh Amendment right to a jury trial, and two, there is a lack of judicial review in alternative dispute resolution decisions. These are important protections a plaintiff should not unknowingly forfeit. The standard for waiving a jury trial is that the waiver must be "knowing, voluntary and intentional."[42] However, arbitration agreements are not held to that standard. Under the FAA, an arbitration agreement is valid unless it is "unconscionable, fraudulent, obtained under duress, or otherwise invalid."[43] Thus, under an arbitration agreement, an employee is not held to the same standard as when waiving their Seventh Amendment right to a jury trial.

Second, there is a concern about the lack of judicial review available in alternative dispute resolution.[44] The Supreme Court has offered minimal guidance about the availability of judicial review.[45] Additionally, the FAA guidelines only provide for judicial review in cases of arbitrator misconduct or bias.[46] With regard to these concerns, the federal courts can provide important advantages for employees.

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[41] Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 213 (3d Cir. 2003) (recognizing the tensions between adequately protecting statutory rights and the federal policy endorsing arbitration.); *see, e.g.*, Leader & Burger, *supra* note 1; Daughtrey & Kidd, *supra* note 7; Walter J. Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No & Maybe*, 14 HOFSTRA LAB. & EMP. L.J. 245, 249 (1996); Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 3 (1994); Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 695 (1993).

[42] Leader & Burger, *supra* note 1, at 108.

[43] *Id.*; *see* 9 U.S.C.A. § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[44] Leader & Burger, *supra* note 1, at 117 (suggesting the concern about the lack of judicial review is actually rooted in the "concern that arbitrators will misinterpret the law and that courts will abdicate their responsibility to enforce it.").

[45] *Id.* at 118.

[46] *Id.*

2. *Difficulties for Employees to Effectively Utilize the Federal Courts*

When employees attempt to enforce their statutory claims in federal court, they face disparaging results and continued obstacles. There are several barriers to an employee finding relief in federal court. For one, many discrimination cases have potential damages that are too small to entice an attorney to take the case.[47] Additionally, with the changing legal precedents in employment discrimination case law, many attorneys will not represent an employee without direct evidence of intentional discrimination.[48] This is a legitimate deterrent to employees because it requires expensive upfront discovery costs. These upfront discovery costs increase the already extremely expensive litigation fees that occur in employment discrimination cases.[49] Additionally, the direct evidence requirement hinders an employee's case because there is an uneven distribution of information between employers and employees. Employees often do not have all of the necessary information to make a case outright.[50]

The time consuming nature of litigation presents a barrier for employees. As the employee waits for resolution, litigation takes an emotional and physical toll on their personal relationships and livelihood.[51] Employment

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[47] Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003) ("A 1995 survey of plaintiff employment lawyers found that an employee needed to have a minimum of $60,000 in provable damages, not including pain and suffering or punitive damages, before an attorney would take the case.").

[48] Hippensteele, *supra* note 9, at 222–23. This belief is based on the current judicial scheme for employment discrimination. *See id.* More than 95% of Title VII cases are intentional discrimination, which reflects "unconscious bias among white male justices." *Id.* at 223. Without proof of intentional discrimination, the claim is rarely viewed as "a legitimate or persuasive ground for redress." *Id.*

[49] Leader & Burger, *supra* note 1, at 90 ("Defense costs and fees average in excess of $100,000 if a case is tried.").

[50] Hippensteele, *supra* note 9, at 222. Even when employees find suitable counsel, counsel is often unable to effectively prioritize their goals in the litigation process and achieve the desired resolutions. *See id.*

[51] *See id.* at 222; *see also* E.R. Shipp, *The Litigious Groves of Academe*, N.Y. TIMES, Nov. 8, 1987, at 12. A plaintiff suing for sex discrimination recounted the eleven-year period of her litigation. *See id.* During this time, she questioned her decision and "felt discouraged, depressed, and overcome by self pity. There were nights she lay awake wondering, 'if we lose, how are we going to pay for this?'" *Id.* Her litigation and the constant battle to raise money for legal expenses became all consuming. *See id. See also*

discrimination cases are lengthy and can continue on for years. State and federal agencies that process the employment complaints, like the EEOC, are so overburdened that claim resolution cannot proceed efficiently.[52] Many employees who seek to file a complaint with the EEOC are discouraged by the length of time it takes to resolve a complaint through the EEOC.[53]

Finally, even if the employee endures the expense and drawn out nature of litigation, they are rarely successful at trial.[54] Only 35.5% of employees obtain favorable outcomes at trial.[55] The small success rate combined with the broad enforcement of arbitration agreements by the Supreme Court has increased the prevalence of alternative dispute resolution options, especially arbitration.[56]

B. *Arbitration of Employment Discrimination Cases has Been Met with Mixed Results*

The courts have continually embraced arbitration as an appropriate means of resolving statutory employment discrimination cases. After initially denying arbitration of statutory claims, since the 1980s, the Supreme Court has embraced a broad application of the FAA to statutory suits.[57] Pivotally, *Gilmer v. Interstate/Johnson Lane* represented an important shift towards enforcement of arbitration claims in employment discrimination suits.[58] In

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Taking Your Discrimination Case to Court, ROCKY MOUNTAIN NEWS, Sept. 21, 1997, at 2G; Sheila Anne Feeney, *Trying Times: "Taking it to Court" Takes a Heavy Toll in Mental Anguish*, CHICAGO SUN TIMES, Dec. 20, 1987, at 7.

[52] *Id.* at 211; *see* Michael Arndt, *Overworked, Ineffective, EEOC Can't Keep Up*, CHI. TRIB., Feb. 12, 1995, at C1; Richard Whitt, *Fighting Sex Harassment Slow Gains in War on Bias Women Discover EEOC Offers Little Support, Sympathy*, ATLANTA JOURNAL & CONSTITUTION, Oct. 4, 1992, at A1.

[53] *See id.* at 222; *see also* Bob Deans, *Gore Upping Ante in Race-Bias Fight*, SAN ANTONIO EXPRESS NEWS, Jan. 19 1998, at A1 (1998 report stating it took an average of 9.4 months to process a complaint at the EEOC).

[54] Leader & Burger, *supra* note 1, at 89.

[55] *Id.* at 89. According to some studies, that number may be even less. One study found that employees only prevail 14.9% of the time at the district court level. *Id.*

[56] *See* AVERY, *supra* note 7, at 926 (8th ed. 2010). Arbitration is the most widely used ADR method.

[57] *See id.*, *supra* note 38.

[58] Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991). In *Gilmer*, an employee, Robert Gilmer, with the New York Stock Exchange was fired at the age of 62. Gilmer filed an Age Discrimination in Employment (ADEA) claim in federal court and with the EEOC. However, when Gilmer registered with the New York Stock Exchange, he agreed

Gilmer, the petitioner was registered with the New York Stock Exchange (NYSE) as a requirement for his position as a securities representative.[59] Contained in his agreement with the NYSE, the petitioner agreed to arbitrate any "dispute, claim or controversy" that arose between him and Interstate/Johnson Lane.[60] When the petitioner was terminated at age 62, he sought to file his Age Discrimination in Employment (ADEA) claim in the federal court and with the EEOC.[61] The Supreme Court granted certiorari on the case to resolve the arbitrability of ADEA claims.[62] The Supreme Court held that the arbitration agreement was enforceable.[63] Critically, the Court said, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue."[64] The Court rejected Gilmer's arguments about the potential implications of arbitrating employment claims, such as the lack of ability to make social policy and potentially undermining the role of the EEOC.[65] The Court no longer viewed arbitration as forfeiting fundamental rights, but instead submitting "to their resolution in an arbitral, rather than a judicial, forum."[66]

The Court's broad enforcement of arbitration has created several advantages for employees. The efficiency of arbitration prevents the judicial problems of time delay and cost.[67] Additionally, employees are statistically

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to arbitrate any dispute between himself and his employer. The District Court applied *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), to Gilmer's dispute and held that Gilmer could pursue his employment discrimination case in federal court. The Fourth Circuit Court of Appeals reversed, holding that the ADEA does not preclude arbitration. The Supreme Court upheld the Fourth Circuit, despite their previous holding in *Alexander*.

[59] *Gilmer*, 500 U.S. at 23.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 24.

[63] *Id.* at 20.

[64] *Id.* at 26.

[65] *Gilmer*, 500 U.S. at 27–28. The Court held that social policy could still be made in an arbitrational forum. Additionally, the Court rejected the possibility of arbitrator bias, the consequences of limited discovery, the lack of written opinions, the lack of ability to bring a class action and the unfairness arising from unequal bargaining power of the employees. *Id.* at 30–32.

[66] *Id.*

[67] Bales, *supra* note 7, at 2 ("[A]rbitration provides a forum for resolving employment disputes, particularly for those employees with limited resources whose

more successful in arbitration than in federal court.[68] Employees are successful 63% of the time in arbitration, and although the awards are lower than in federal court, they do not experience the crippling litigation costs.[69]

However, arbitration is not a perfect fit for employment discrimination cases because the current arbitration model used for employment discrimination disputes is the same model used for commercial arbitration, which prioritizes efficiency.[70] The inherent assumptions in commercial arbitration do not always translate well into an employment discrimination context.[71] Commercial arbitration was created to accomplish dramatically different goals than employment discrimination arbitration. Commercial arbitration was used to settle disputes quickly and efficiently without sacrificing a potential business deal.[72] However, employment discrimination cases inherently require recognition of an employee's rights and appropriate remedies.[73] Speed and efficiency are not necessarily the main goals of the proceeding. The limited review and accelerated process behind commercial arbitration does not adequately provide vindication of statutory rights and sufficient relief for employees.[74]

However, the quick and efficient model of commercial arbitration is not the largest impediment in an employment discrimination model. The real flaw behind the current arbitration model is it continues to embrace the same "perpetrator" model used by the court system to settle employment disputes.[75] The perpetrator model pits one party as morally good and the

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claims are too questionable or with damages too low to attract a lawyer willing to take the case on a contingency basis.").

[68] Leader & Burger, *supra* note 1, at 89.

[69] *Id.*; *see also* Robert Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. REV. 627, 630 (2003) ("Although most mediations—except in the rarest of cases—will not result in the high award that a jury might give, Plaintiffs, or Charging Parties ('CPs'), who achieve fair settlement will get satisfaction and closure instead.").

[70] Daughtrey & Kidd, *supra* note 7, at 64.

[71] *Id.* Commercial arbitration was embraced by industry due to three policy goals: faster resolution, cost effective, and limited or no judicial review. However, these goals do not always fit when the process is used to arbitrate statutory claims.

[72] *Id.*

[73] *Id.* at 65.

[74] *Id.*

[75] Butcher, *supra* note 12, at 226 ("[U]sing Alternative Dispute Resolution (ADR) to address these kinds of actions refutes the perpetrator model by allowing that discrimination is neither aberrational nor infrequent. ADR offers a less confrontational,

other as morally evil.[76] It is completely black and white, without consideration of ongoing relationships.[77] Arbitration is remarkably similar to an adjudicative process as the two parties operate as adversaries.[78] The perpetrator model is premised on two flawed assumptions: (1) It presumes discrimination is isolated and infrequent and (2) it analyzes discrimination actions in a moral dichotomy.[79] As a result of these assumptions, arbitration overemphasizes conscious actors and fails to recognize institutional and unconscious forces.[80] By promoting the fiction that discrimination only occurs when individual parties behave in a manner isolated from the rest of the workplace, employees and employers are unable to create working solutions.[81] Traditional alternative dispute resolution systems do not adequately address the root of many discrimination suits: Divergent power dynamics, personal and relational conflicts, and the negative dynamics of the workplace.[82]

C. *Promise of Mediation*

Unlike arbitration and the court system, which are restricted to a rigid adversarial structure, mediation is more flexible and adaptable to the current workplace environment. Mediation can offer creative solutions to certain types of injuries, like relational conflicts, power imbalances, and workplace dynamics, which are difficult to represent in the traditional model.[83] In particular, mediation presents several distinct advantages to arbitration and

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less guilt-oriented medium to resolve disputes and address sensitive, emotional issues without the attendant shame and stigma that result from public court battles.").

[76] *Id.* at 234 (citing David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 971 (2003)) (describing the "perpetrator model" as a "modern morality play").

[77] *Id.*

[78] *See* Hippensteele, *supra* note 9, at 222.

[79] Butcher, *supra* note 12, at 232.

[80] *Id.* at 233 ("[T]he model gives birth to the ugly stigma of being a discriminator which a defendant employer will understandably want to avoid, though at a cost to the plaintiffs. The perpetrator model labels anyone who engages in discrimination as a sinner who should be frowned upon by the enlightened masses.").

[81] Hippensteele, *supra* note 9, at 222.

[82] *Id.* at 224.

[83] *Id.* ("Employee grievants may consider informal options more conducive to remedying certain types of injury because these processes typically carry with them the promise of 'validating' emotional harm with an opportunity to discuss feelings with the other party.").

the court system because it offers personalized remedies, empowerment over the process, and procedural fairness.[84]

1. *Mediation Models*

Professor Ellen Waldman characterizes traditional mediation theory in three models: "norm generating," "norm educating," and "norm advocating."[85] The traditional model of mediation is norm generating, where complete control of the process rests with the participants themselves.[86] The parties are free to creatively fashion individualized solutions to the dispute without regard to social or legal norms.[87] The mediator guides the parties towards a solution by providing structure for the conversation, helping probe for solutions, and ultimately identifying solutions.[88]

The second model is norm educating, where the mediator informs the parties of social and legal norms to educate their decisionmaking.[89] Norm educating mediation facilitates party autonomy because the mediator only references social and legal norms as a baseline for party negotiations.[90] In certain contexts, such as divorce or bankruptcy, it is important that the parties know their appropriate rights to make the most informed decision.[91] However, the parties do not have to follow the legal or social norms; the norms merely serve as a well-informed waiver of legal rights.[92] Therefore,

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[84] *Id.* at 231. Additionally, mediation also combats the disadvantages of litigation because mediation participants have cited, "decreased time, expense, satisfaction with the outcome, and participant compliance."

[85] Waldman, *supra* note 4, at 707.

[86] *Id.* at 718.

[87] *Id.*

[88] *Id.* at 716. The mediator has several techniques at his disposal to aid in this process. For instance, he encourages face-to-face communication, engages in active listening, delves into underlying needs, eliminates personal and disruptive attacks between the parties, helps reframe arguments and solutions to ensure understanding, and helps bring the problem into a real world focus. *Id.* at 716–18.

[89] *Id.* at 733. Norm educating mediation is most closely associated with divorce mediation. However, it is widely used in a variety of fields from bankruptcy, property, special education, and labor grievances. It is heavily used in the workplace setting, where the American Arbitration Association even established proper protocol for norm educating mediation in the workplace. *Id.* at 733–42.

[90] Waldman, *supra* note 4, at 730.

[91] *Id.* at 732.

[92] *Id.* at 741 ("The norm-educating model of mediation strikes a compromise between those who would bar discussion of law entirely from mediation practice and

this form of mediation is best suited for situations where it is important for parties to know their rights, but the mediators are not obligated to enforce them.[93]

The third model of mediation is the norm advocating model. This model extends the principles behind the norm educating model because the mediation process not only educates, but incorporates norms into the parties' solution.[94] Social and legal norms are not merely used as a starting point for negotiations; instead, the mediator must ensure their implementation.[95] Disputes that are effectively resolved through this model are often concerned with societal objectives beyond the parties' individual goals or individual concerns that have unequal bargaining power and legal savvy to negotiate their rights.[96]

2. *Benefits of Norm Advocating Mediation*

Norm advocating mediation is particularly well suited for statutory employment discrimination claims. In norm advocating mediation, the mediator educates the parties about legal, social, and ethical norms and includes these norms in the discussion and the solution. [97] This model is appropriate for employment discrimination cases because the mediation discussion starts with the statutory mandate.[98]

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those who would outlaw mediation because it strays too far from the normative moorings of our adversary system.").

[93] *Id.* This model is less used than either the norm generating or the norm educating model. However, it has been used successfully to resolve bioethical, environmental, and zoning suits. *Id.* at 746.

[94] *Id.* at 746.

[95] Waldman, *supra* note 4, at 745.

[96] *Id.* at 753. Additionally, these disputes can be characterized by interconnected issues and parties and emotional issues.

[97] *Id.* at 745.

[98] *Id.* at 750 ("[M]ediation of disability or discrimination claims under the auspices of the Equal Employment Opportunity Commission (EEOC) or the Department of Justice (DOJ) begins with the statutory mandate. In these mediations, the parties have an opportunity to articulate their needs and interests. However, these personal norms are effectuated only to the degree that they align with the statutory norms that the EEOC and DOJ are charged with enforcing.").

Norm advocating mediation is a relatively new mediation model that ensures societal norms have a significant impact on the process.[99] This form of mediation is appropriate for employment discrimination cases because employee complainants typically seek rights-based resolutions. Mediation for statutory claims cannot be overly relational because a relational focus risks depriving grievants of their statutorily protected rights.[100]

The EEOC investigated mediation in discrimination suits with an alternative dispute resolution task force, which embraced a form of mediation that vindicates statutory norms.[101] The head of the task force, Ricky Silberman, explained the EEOC's focus when developing a mediation program: "To ensure fairness, all parties must be informed about their rights and responsibilities under the applicable statutes."[102] Use of the EEOC's mediation as part of the claims process has been widespread.[103] Implementation of the mediation program improved satisfaction in the charge process at the EEOC; participants in the program experienced benefits by the efficient and informal nature of the process and the parties' ownership over the process and the remedies.[104] Employers, in particular, saw benefits from the reduced costs associated with reduced discovery and avoiding litigation fees.[105] Employees have been satisfied with the remedies: Reinstatement, promotion, training, improved working conditions, and monetary relief.[106]

The Department of Justice (DOJ) similarly implemented a mediation program for the enforcement of Americans with Disabilities Act (ADA) claims.[107] Mediators in the DOJ program are thoroughly educated in ADA provisions to ensure they analyze solutions cohesively with the parties' legal

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[99] *Id.* at 753.

[100] Hippensteele, *supra* note 9, at 238.

[101] Waldman, *supra* note 4, at 751.

[102] *Id.*

[103] AVERY, *supra* note 7, at 927 ("Between 1999 and 2003, the EEOC mediated 'more than 50,000 cases with approximately 70 percent being successfully resolved in an average time of 85 days[, which is] nearly half the time it takes to resolve the charge through the investigative process.'").

[104] Paul Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 LAB. LAW. 261, 272 (2001) ("In FY 2000, for example, the internal mediator success rate was seventy percent.").

[105] *Id.*

[106] *Id.* ("Since the implementation of the mediation program, monetary benefits for charging parties have been about $150 million.").

[107] Waldman, *supra* note 4, at 752.

rights.[108] A DOJ mediator described their form of norm advocating mediation as rights-based instead of interest-based.[109]

In employment discrimination mediations, the norms are derived from the statute itself. The mediation is framed in terms of the legal rights at issue, but the gray areas that cause conflict can still be negotiated and resolved.[110] Mediation helps resolve the interpersonal issues that underlay the legal conflict.

III. USING THE AMERICANS WITH DISABILITIES ACT AS A MODEL FOR EMPLOYMENT DISCRIMINATION MEDIATIONS

The ADA is uniquely situated to serve as a model for implementing mediation into Title VII disputes.[111] For one, the ADA was the first civil rights statute to contain an explicit provision encouraging the use of alternative dispute resolution to settle claims.[112] Second, the ADA is enforced by two distinct government agencies: the DOJ and the EEOC. These different administrative regimes allow an effectiveness comparison of enforcement techniques. Alternative dispute resolution has been used in

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[108] *Id.*

[109] *Id.* ("As one mediator explained, 'ADA mediations are "rights based" rather than "interest based," which means that applicable law determines parameter of an equitable settlement, rather than a settlement being determined solely by the declared interest of the parties.'").

[110] *Id.* at 755. For example, "the Americans with Disabilities Act may require an employer to 'reasonably accommodate' a disabled employee, but the accommodation could conceivably take different forms, depending on what the parties want." *Id.*

[111] Act of Sept. 25, 2008, Pub. L. No. 110-325, 122 stat. 3554. The effectiveness of mediation in the ADA is increasingly important because of its broadened scope. In 2008, Congress expanded the ADA's coverage. Congress felt the courts and the EEOC were impermissibly narrowing the scope of protection that was intended to be afforded by the ADA. These amendments increased the coverage of the ADA and dramatically increased the number of potential claims under the ADA.

[112] *See* 42 U.S.C. § 12212 (1994) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter."); Judith Cohen, Note, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 6, 6 (2001).

divergent ways to enforce the Act; although, mediation appears to be the preferred approach.[113]

Title I, the provision of the Act prohibiting employment discrimination, uses the enforcement procedure of Title VII of the Civil Rights Act of 1964 and is administered through the EEOC.[114] The EEOC chiefly tries to resolve disputes through negotiation.[115] However, the EEOC has implemented a mediation program for claim management as well. Within the EEOC's mediation program, only ADA cases involving discharge, discipline, or alleged discrimination in the terms and conditions of employment are included within the scope of the mediation.[116] Title I reasonable accommodation cases are excluded from the program.[117]

Title II, which prohibits discrimination by public entities, adopted the procedures of section 505 of the Rehabilitation Act for Enforcement and is enforced by the DOJ.[118] The DOJ also tries to resolve cases using negotiation.[119] The department has funded its mediation program through a grant to the Key Bridge Foundation.[120] Additionally, they have trained professional mediators in the ADA and developed a protocol for resolving ADA complaints through mediation.[121]

A. *ADA's Use of Norm Advocating Mediation*

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[113] Cohen, *supra* note 112, at 6 ("Mediation is especially well suited for resolving ADA complaints."); *see supra* note 9.

[114] Hodges, *supra* note 14, at 1015.

[115] *Id.* at 1023.

[116] *Id.* ("Eighty-seven percent of the charging parties agreed to mediation, but only forty-three percent of employers agreed . . . . [E]mployers were reluctant to mediate discharge cases, . . . because they saw no ground for compromise. Agreement was reached in 52% of the mediated cases.").

[117] *Id.*

[118] *Id.* at 1016.

[119] Hodges, *supra* note 14, at 1029.

[120] Stanley Herr, *Symposium Article: The Americans with Disabilities Act: Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305, 374 (2001); *see also* DEPARTMENT OF JUSTICE ADA MEDIATION PROGRAM, www.ada.gov/mediate.htm (Last updated June 25, 2002).

[121] Hodges, *supra* note 14, at 1029. The enforcement of Title II of the ADA by the DOJ provides an interesting comparison for other employment statutes with the EEOC's enforcement.

Both agencies use a form of norm advocating mediation to resolve ADA disputes.[122] Use of norm advocating mediation is not effective unless the mediators are adequately trained because the mediator must ensure the social or legal norm will be applied in the solution.[123] The DOJ provides an excellent example of how trained and knowledgeable mediators strengthen the program. In DOJ mediations, the mediators are specially trained in the legal specifications of the ADA to ensure they are capable of analyzing solutions in context of the legal parameters.[124] Frank Scardilli, Senior Staff Counsel and Chief Circuit Mediator of the United States Court of Appeals for the Second Circuit, emphasized the importance of understanding the ADA's legal standards: "With ADA cases, specific criteria have to be met for the plaintiff to be considered disabled under the law. It is important that the mediator understand this and be aware of the elements of a cause of action under the ADA and case precedent."[125]

With the statutory mandate behind the discussion, mediation can focus on the rights-based outcomes that should be achieved with the process.[126] This assumption of rights-based outcomes is controversial in mediation theory, because it assumes characteristics of the adversarial system.[127] However, in order to guarantee mediation is an adequate alternative to litigation, it must protect the rights-based objectives that are sought in Title VII statutes. The aims of the statute must still be achieved in a mediation forum.

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[122] *But see* Talbot, *supra* note 69, at 652–53. The EEOC does not consistently use norm advocating mediation to resolve ADA or Title VII disputes. In practice, the mediators alternate between the approaches they feel most comfortable with. The claimant must be ready to negotiate in an interest-based or rights-based setting, with completely different strategies for relief.

[123] Waldman, *supra* note 4, at 745.

[124] *Id.* at 752. In the training manual of the Key Bridge Foundation, the manual emphasizes that mediators that do not understand the ADA are not qualified to mediate claims under the ADA. *Id.* at n.200. *See also* Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. 457 (1994).

[125] Cohen, *supra* note 112. In contrast to EEOC jurisprudence, the DOJ applies a consistent rights-based approach.

[126] Hippensteele, *supra* note 9, at 235.

[127] *Id.* at 246 ("Mediation, as a process in which 'feelings can be expressed,' implicitly subsumes rights based objectives within mediation discourse by coding them as empowerment, fairness, and healing. There is scant reference to, let alone emphasis on, mechanisms that enable a mediator to ensure the rights-based objectives of a Title VII grievant will be met through the mediation process.").

1. *Application of Norm Advocating Model in ADA Mediation*

The ideal application of the norm advocating model occurs in a case where there are ongoing relationships, important societal implications, and a vulnerable disputant.[128] The ADA brings a non-perpetrator focus to the mediation because both parties are focusing on a relatively neutral proposition: reasonable accommodation.[129] The Eighth Circuit's case, *Huber v. Wal-Mart Stores, Inc.*, provides a great example of the potential of norm advocating mediation to improve user satisfaction in ADA claims.[130]

In the dispute, Pam Huber worked as a dry grocery order filler earning $13.00 per hour.[131] While in the dry grocery order filler position, she sustained permanent injury to her arm and could no longer fulfill the tasks required by the position.[132] Huber sought to be "reasonably accommodated" in an alternate position as a *router*.[133] However, Wal-Mart had an existing policy, which required that only the most qualified persons could fill a vacant job position.[134] Therefore, Wal-Mart believed it would be within the "reasonable accommodation" language of the ADA and their existing policy for Huber to compete for the position with the rest of the applicants.[135] Huber competed for the position, but Wal-Mart filled the position with a non-disabled person.[136] Instead, Huber received a maintenance position which paid $7.97 per hour.[137] Subsequently, Huber filed suit under the ADA claiming that she should have been assigned to the router position as a reasonable accommodation.[138]

If the parties had attempted to resolve the dispute through norm advocating mediation, the mediator would first have a "story telling"

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[128] Waldman, *supra* note 4, at 753 ("[S]ome disputes will be best resolved through a process which combines the informality of mediation with the reliance on legal and social norms characteristic of adjudication.").

[129] *Id.* at 755.

[130] Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007).

[131] *Id.* at 481.

[132] *Id.*

[133] *Id.* Both parties agreed this was a vacant and equivalent position under the statute.

[134] *Id.*

[135] *Id.* at 482.

[136] *Huber*, 486 F.3d at 481.

[137] *Id.*

[138] *Id.* at 482.

phase.[139] In this phase, each party would explain their side to the mediator. Wal-Mart would explain how they felt they were reasonably accommodating Huber within their legitimate company policy of competing for positions. Huber would explain how she was qualified for the router job, and should have been reassigned it as a reasonable accommodation.

Then, listening to each side's version of the dispute, the mediator would construct an agenda of the relevant controversies.[140] The parties would list the important points of disagreement: Back pay, remedies, entitlement to the open position, etc. In this case, the parties seemed to disagree about what constituted a reasonable accommodation. Is it reasonable to compete for a position or should a disabled person be assigned to an alternate position as a matter of course? The mediator would clarify this as the central issue and then try to guide discussion to how the parties could reasonably accommodate Huber under the statute and if she was entitled to any remedies for Wal-Mart's failure to accommodate with the router position.

After clarifying the central issues, the mediator would explain the existing standards and precedents for reasonable accommodation. The mediator would first explain the standard for reasonable accommodation under the ADA. When explaining the legal standards, the mediator focuses on the points of agreement under the law.[141]

The mediator would then guide the brainstorming of the appropriate reasonable accommodations. In this discussion, the mediator would focus solutions towards options most consistent with the case law. Thereafter, Huber and Wal-Mart would be free to explore various options for reasonable accommodation within the confines of the statute.

B. *Non-Perpetrator Focus of the ADA*

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[139] *See* Waldman, *supra* note 4, at 745.

[140] *Id.*

[141] *See also id.* Therefore, the mediator would not necessarily need to explain the conflicting case law. For instance, in this case, the Tenth Circuit holds a reasonable accommodation entails an automatic award of the position to the disabled person and the Seventh Circuit holds a reasonable accommodation could go to a more qualified person. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999). Either solution would be technically correct due to the conflicting case law, so the mediator does not need to focus the mediation on additional points of conflict. As long as the solution is consistent with the legal consensus, it satisfies the statute.

The effectiveness of ADA enforcement is increased by its unique structure of prohibiting discrimination without focusing on the moral stigma attached.[142] This focus is clear in the proof structure of an ADA case. The employer carries a burden of persuasion to prove that the requested accommodation is unreasonable and presents an undue hardship.[143] The employee carries a burden of production that his individual capacities could be accommodated by a reasonable accommodation that does not present an undue hardship.[144] These proof structures center on practical solutions to the disability.

The unique feature of the ADA's neutral focus is especially exceptional when compared to the proof structure for Title VII claims. Title VII claims are divided into disparate treatment and disparate impact claims.[145] The majority of cases brought are under the disparate treatment category.[146] In disparate treatment categories, the employee must prove (1) he is a member of a protected class, (2) he is qualified and applied for the job in question, (3) he was rejected, and (4) the position remained open and the employer continued to seek candidates.[147] The concentration under this model is on the moral blameworthiness of the employer.[148]

However, if mediators could accept cognitive dissonance on the part of the employer, it would allow the emphasis to be on achieving the practical objective behind both of the statutes: increased equal employment

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[142] Butcher, *supra* note 12, at 246 ("[S]ome courts, including the Supreme Court, have been willing to concede that an employer may intentionally breach the ADA without invoking the moral stigma that usually attaches to illicit discriminatory action."). The lack of moral stigma exists because a discussion of perpetrator "intent" is not relevant to ADA jurisprudence or case law. *Id.* at 249.

[143] *Id.* at 249. This approach has been adopted by the Ninth and Fifth Circuits. The Second Circuit has a similar approach.

[144] *Id.*

[145] Talbot, *supra* note 69, at 635 ("Disparate treatment cases involve a subjective intent to discriminate by the employer. The disparate impact theory is used when the employer's treatment of different groups appears facially neutral yet has a harsher impact on members of the protected group.").

[146] *Id.*

[147] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 792–93 (1973).

[148] Butcher, *supra* note 12, at 228–29 ("The theory of disparate treatment relies on the conscious intent of the employer. Throughout the case, the plaintiff carries the burden of persuasion to convince the court that the respondent's actions were motivated by a conscious animus to disadvantage the plaintiff on the basis of her race, gender, color, religion, or national origin."); Talbot, *supra* note 69, at 635.

opportunities.[149] This theory does not pardon discrimination, but refocuses the discussion on the goals of the statute.[150] Additionally, this approach more adequately represents the realities of unconscious bias.[151]

Embracing the non-perpetrator focus of the ADA as a model for norm advocating mediation allows restorative justice to occur within the mediation. Restorative justice is a focus on the "restoration of human dignity, property loss, and damaged relationships."[152] The process of mediation achieves this aim by allowing emotions and frustration to be expressed before moving on to problem solving.[153] A non-perpetrator focus allows relationships to be restored through collaborative problem solving.[154]

1. *Utilizing Norm Advocating Mediation to Eliminate Perpetrator Focus in Title VII Disputes*

The perpetrator model of enforcement in Title VII disputes does not adequately represent current workplace discrimination.[155] Modern workplace discrimination is characterized by unconscious bias and stereotyping that is better addressed in a flexible problem solving environment.[156] When the majority of modern discrimination is a result of unconscious bias, placing a

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[149] Butcher, *supra* note 12, at 247.

[150] *Id.*

[151] Hippensteele, *supra* note 9, at 222 ("[A]ntidiscrimination law, as applied by the courts and the EEOC, has developed around a perpetrator perspective that promotes the fiction that discrimination occurs because individual actors behave in ways uncharacteristic of the majority of the workplace.").

[152] Butcher, *supra* note 12, at 252. Professor John Braithwaite describes restorative justice as giving a "voice to the values of forgiveness, apology, mercy, and reconciliation."

[153] Hippensteele, *supra* note 9, at 237.

[154] *Id.* at 238.

[155] Butcher, *supra* note 12, at 231 ("As Alan David Freeman has pointed out, anti-discrimination law's singular focus on the perpetrator view of discrimination limits its ability to combat discrimination in its subtler, but equally pernicious forms.").

[156] Hippensteele, *supra* note 9, at 218 ("Obvious job segregation and blatant workplace discrimination have been largely replaced by a more subtle, 'second generation' discrimination that is less overt. Legal scholars relying on social scientific studies of conscious and unconscious bias have suggested that intentional, conscious discrimination now accounts for only a fraction of current workplace discrimination and that most of the discrimination occurring in the workplace is the result of unconscious bias and stereotypes.").

stigmatized label of *discriminator* on the employer actually damages the possibility for creating working solutions.[157]

The ADA non-perpetrator model focuses on reasonable accommodation without discussion of the intent of the employer.[158] The focus on solutions increases the possible relief for the plaintiff. By recognizing the realities of unconscious decisionmaking, the ADA increases the cooperation among the parties in creating lasting solutions.

Norm advocating mediation can be used to facilitate this objective.[159] By setting Title VII's statutory requirements as the framework, norm advocating mediation establishes a mutual goal of satisfying the statutory obligation.[160] Creating the statutory goal eliminates the moral blameworthiness of the employer because both parties are working to achieve a realistic rights-based solution consistent with their ongoing working relationship. For example, in the ADA, an employer is required to reasonably accommodate an employee's disability. This would be the mutual goal. Then, the parties can negotiate about how to achieve the reasonable accommodation. Similarly, in Title VII jurisprudence, a plaintiff suing under disparate impact analysis wants equal opportunity to job promotions.[161] The rights-based objective would be equal

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[157] Butcher, *supra* note 12, at 235 (describing an attorney's difficulty obtaining relief for her client because the law requires proof of a discriminatory motive that the employer would never admit to due to the implications of being labeled a racist and a bigot); *see also* Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 641–44 (1998).

[158] Butcher, *supra* note 12, at 246 ("The ADA encompasses a type of discrimination that has been branded as wrongful, insofar as it is unreasonable for certain employment decisions to be predicated on such grounds, yet the courts and the public believe that well-intentioned people may at times make decisions based on illicit criteria. When they do, no public shamings attach, the defendant is simply asked to rectify the wrong.").

[159] Hippensteele, *supra* note 9, at 233. Norm advocating mediation is considered advantageous when an ongoing relationship between the parties is needed, like the workplace.

[160] Waldman, *supra* note 4, at 752. Legal norms are created by the statute.

[161] The norm advocating mediation framework can be applied to a Title VII claim under the disparate treatment analysis as well. Although the mediation may be more contentious, the same principles would apply. For example, in *Texas Department of Community Affairs v. Burdine*, the plaintiff was passed over for a promotion and ultimately terminated. The legal norm in that case is whether under the statute her denial of promotion and termination was fair and not based on discrimination. Then, the employer can explain its proffered "nondiscriminatory" reasons and the employee can explain why the termination was unfair and had gender considerations. After that discussion, the mediator can explain legal precedents for gender discrimination.

opportunity to job promotions regardless of race. That is an objective both parties can likely agree on, which would eliminate the moral blameworthiness of the employer's actions.[162]

Once the norm is established, the parties can negotiate within the open boundaries of achieving that legal goal.[163] Many employees are not able to achieve their relational goals, such as moving beyond the negative discriminatory experience, until they achieve a rights-based resolution.[164] Norm advocating mediation provides the advantage that an employee can assert legal rights while maintaining a facilitative and relational process to address the emotional implications.[165]

IV. FULFILLING THE PROMISE OF MEDIATION

In order for the ADA's norm advocating mediation to adequately provide a model for other Title VII disputes, it needs to better address the concerns of protecting statutory rights. To better safeguard the statutory rights of employees, norm advocating mediation should include mediators trained in employment discrimination law, protection for the power imbalance between individual employees and large-scale organizations, reviewable settlements, and settlement enforcement mechanisms.

A. *Qualified and Competent Mediators*

Ultimately, the employee and employer should reach some agreement on backpay, reinstatement, etc. During each subsequent discussion point, the mediator will guide the brainstorming towards viable options under the legal framework. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

[162] An example of a rights-based objective under Title VII occurred in *Watson v. Fort Worth Bank & Trust*, where the plaintiff sued under Title VII to determine whether the employer's practice of subjectively determining promotion decisions constituted illegal discrimination. In that case, the rights-based objective would be equal opportunity to job positions. The parties could then negotiate over whether subjective procedures should be used, whether to have formalized selection criteria, etc. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

[163] Waldman, *supra* note 4, at 755.

[164] Hippensteele, *supra* note 9, at 236.

[165] *Id.* at 238 ("[M]ediation, by emphasizing personal empowerment through emotional exchange and processing, translates a discourse of rights through which healing follows remedy and restitution into a discourse of healing, radically redefining the fair and equitable remedy in the context of employment discrimination.").

At the root of the norm advocating model is the legal norm derived from the statute.[166] Therefore, the mediator must be thoroughly trained in the meaning of the statute. This is contrary to much of existing mediator philosophy; however, given the mediator's role in interpreting substantive statutory rights, it is a necessity.[167] In norm advocating mediation, a mediator does not merely facilitate the discussion towards settlement.[168] Instead, the mediator frames the settlement in terms of the statutory norms.

To adequately guide and facilitate discussion, a mediator should be a lawyer who is thoroughly trained in the complexities of the statute.[169] The mediator should also be able to critically discern every feasible remedy under the statute to ensure the parties will be able to achieve a satisfactory resolution.[170]

Second, the mediators should have extensive mediation training either through a training course or prior experience.[171] Employment discrimination mediation features parties that initially are diametrically opposed. In order for norm advocating mediation to be effective, the mediator needs to be able to effectively facilitate conversation away from these irreconcilable viewpoints towards a mutual solution.[172]

B. *Protection for the Power Differential Between Employees and Organizations*

For the mediation to adequately protect the statutory rights of grievants, the employee must first understand the statutory rights at issue. Currently,

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[166] Waldman, *supra* note 4, at 753. The legal norms guide the decisionmaking, but unlike other forms of mediation, the norms are not created by the parties themselves but from the mandates of the statute.

[167] *Id.* at 762 (citing Edward F. Hartfield, *Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes*, 12 SETON HALL LEGIS. J. 109 (1988)) (explaining the belief that too much subject matter in a certain area of expertise can unfairly bias the mediator).

[168] *Id.*

[169] Talbot, *supra* note 69, at 662. The mediator should also be knowledgeable about the case law interpreting the statute.

[170] Hodges, *supra* note 14, at 1081–82.

[171] *Id.* at 1080 ("It goes without saying that the mediators should be trained in mediation skills.").

[172] Waldman, *supra* note 4, at 745. During the agenda stage, the mediator encourages brainstorming among the parties about creating a feasible solution.

both parties are able, but not required, to have an attorney present.[173] However, the requirement of a knowledgeable representative for the grievants should not be voluntary. The party would not have to utilize the representative, but a de facto legal representative should be available to explain the statutory protections and rights the party is entitled to.

A de facto legal representative is especially important to eradicating the large power differential between employees and large-scale organizations.[174] Unlike organizations and sophisticated business enterprises, many employees are not aware of their statutory rights and options.[175] This lack of knowledge puts them at a distinct disadvantage in the bargaining process, which means any mediated settlement may not adequately or fairly represent their particular needs or statutory rights.

Additionally, a de facto legal representative is a procedural safeguard for the process when mediation is charged with enforcing statutory rights. One of the many benefits of mediation is its relational focus, especially the ability to move beyond the discriminatory experience.[176] However, an overemphasis on relational goals risks jeopardizing substantive issues.[177] A de facto legal representative ensures each party will know their substantive rights and not get dissuaded from enforcing them in the cooperative atmosphere of mediation.[178]

C. *Written Reviewable Mediation Settlements*

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[173] Butcher, *supra* note 12, at 257.

[174] Hodges, *supra* note 14, at 1086 ("[C]omplainants may be at a disadvantage in this informal procedure because of the historical discrimination they have endured and their lack of resources.").

[175] *Id.*

[176] Hippensteele, *supra* note 9, at 236.

[177] *Id.* at 238 ("Both the process and outcome goals of mediation in the employment context prioritize 'creative' over substantive resolutions and mitigating, rather than correcting, injury and inequity that are the substance of the employee's claim.").

[178] *See, e.g.*, Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 43, 63 (2006). Professor Hippensteele suggests women are among the groups disadvantaged by more informal adjudicatory methods because "women are socialized to seek non-confrontational, relational strategies for resolving disputes rather than strategies that emphasize rights-based outcomes. Women who engage in informal dispute resolution with men tend to be disadvantaged because men are socialized to pursue self-interest and a favorable outcome when involved in disputes."

Employers prize the confidentiality of mediated settlements.[179] Furthermore, the Administrative Dispute Resolution Act mandates confidentiality in administrative alternative dispute resolutions.[180] However, the emphasis on confidentiality limits review of mediated decisions. The lack of oversight over mediated settlements can create two potentially damaging problems: One, statutory rights will be incorrectly applied, and two, mediated settlements will decrease the growth of case law developing statutory rights.[181] The second concern is unfounded because the EEOC's caseload is significantly backlogged and the goal behind the statutes is not building precedent, but resolution and vindication of statutory rights.[182]

The concern over the misapplication of statutory rights is heightened in mediation because of the lack of procedural safeguards in mediation that would ordinarily be available in litigation.[183] Therefore, when a statutory right is at issue in mediation, oversight is critical to ensuring that right was appropriately analyzed. Every mediation settlement should include a written settlement between the parties. Once settlement is reached, there should be limited review by the enforcing agency, the EEOC, to guarantee the settlement is in accord with the statute.[184] If a mediated settlement conflicts with the statute, the agency should send it back to the mediator with an agency representative present to renegotiate the conflicted portion. An employer's confidentiality would only be impinged to the extent of agency review; the settlement would not be available to the general public.

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[179] Daughtrey & Kidd, *supra* note 7, at 42. Federal arbitration law was developed to enhance the needs of commercial parties, who preferred a private forum.

[180] Hodges, *supra* note 14, at 1089; *see* 5 U.S.C. § 574 (1994).

[181] Leader & Burger, *supra* note 1, at 117; *see* Irving R. Kaufman, *Reform for A System in Crisis: Alternative Dispute Resolution in Federal Courts*, 59 FORDHAM L. REV. 1, 27–31 (1990) (arguing that when civil litigants bypass public trials, it stunts the evolution of case law legal principles that develop public policy and norms).

[182] Hodges, *supra* note 14, at 1054; *see also* Kaufman, *supra* note 181, at 38 (The Pound Conference Report argues for the resolution of cases with ADR by stating, "[c]onstitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it."). *But see* HENRY J. BROWN & ARTHUR L. MARRIOT, ADR PRINCIPLES AND PRACTICE 396 (1993) (arguing not all types of litigation are best resolved through ADR settlement, particularly issues involving fundamental human rights and civil liberties).

[183] Hippensteele, *supra* note 9, at 228.

[184] Hodges, *supra* note 14, at 1084.

D. *Effective Enforcement of Mediated Settlements*

Mediated settlements of statutory antidiscrimination rights are only effective to the extent that the settlement is enforceable.[185] Employees who seek mediated adjudication of workplace discrimination or harassment predominantly want the offensive conduct or behavior to end.[186] Therefore, in order to ensure these rights-based objectives, there needs to be a guarantee that the mediated settlement will be enforced.

The mediated settlement should operate as a contractual agreement where both parties agree to abide by their settlement. If either party breaks the agreement, the party should be able to seek enforcement. First, the EEOC should investigate and review the settlement for compliance. Then, the EEOC should post a public non-compliance notice if the EEOC finds a party did not comply. Non-compliance correlates with the existing rationale for disclosing a mediated settlement under the Administrative Dispute Resolution Act.[187] It also operates as an incentive for parties to comply with their agreed upon settlements.

Finally, if these enforcement techniques are not effective, the EEOC should support the party in bringing a breach of contract claim in federal court.[188]

V. CONCLUSION

Americans spend the majority of their waking hours in the workplace.[189] However, there is still not a consistent or comprehensive system that reflects

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[185] *See id.* at 1084. For the most part, mediated settlements are widely complied with by both parties.

[186] Hippensteele, *supra* note 9, at 234 ("People who experience harassment or other discrimination at work generally want (1) the offensive conduct to stop, (2) assurances that the conduct will not reoccur, (3) assurances that others will not be treated similarly, (4) protection from retaliation, and (5) the ability to regain the type of work environment they had prior to experiencing the offensive conduct.").

[187] 5 U.S.C. § 574 (2011) ([a] Court can decide to disclose a settlement to "(A) prevent a manifest injustice; (B) help establish a violation of law; or (C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.").

[188] Hodges, *supra* note 14, at 1084. Federal courts are split on whether a breach of contract claim can be brought for noncompliance of a settlement agreement under Title VII.

the realities of disputes that occur in the workplace. The EEOC does not employ a consistent approach in their Title VII mediations mediators intermittently utilize interest-based and rights-based mediation techniques.[190] The lack of consistency adjudicating claims under the statute seriously undermines the goals and effectiveness of Title VII.[191]

Therefore, the EEOC needs a more effective adjudication process for Title VII claims. Norm advocating mediation provides the benefits of mediation—preserving ongoing relationships, incorporating elements of restorative justice, and high user satisfaction—while also satisfying the statutory mandate. The most efficient use of the norm advocating model of mediation centers the mediation on mutual non-perpetrator objectives. With a mutual goal, it increases the number of collaborative solutions aiding reciprocal enforcement of the mediated settlement.[192]

With increased procedural precautions, the EEOC would ensure this form of norm advocating mediation not only efficiently executed the aims of the statute, but also provided employees a superior alternative to litigation. This note has argued this model of mediation is a more realistic adjudication of employment relationships. Furthermore, this model demonstrates that a continued employment relationship and enforcement of social and legal norms can peacefully coexist.

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[189] Press Release, Department of Labor, American Time Use Study—2009 Results (June 22, 2010), http://www.bls.gov/news.release/pdf/atus.pdf.

[190] Talbot, *supra* note 69, at 652.

[191] *Id.* at 653 ("[A] tendency towards one or the other approach will influence what happens in the mediation.").

[192] Butcher, *supra* note 12, at 257.